UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| MING HOM Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>VALE S.A., MURILO PINTO DE OLIVEIRA FERREIRA, AND LUCIANO SIANI PIRES,<br><br>Defendants. | Case No. 1:15-cv-09539-GHW |
| VALLI T. CHIN Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>VALE S.A., MURILO PINTO DE OLIVEIRA FERREIRA, LUCIANO SIANI PIRES, and PETER POPPINGA,<br><br>Defendants. | Case No. 1:16-cv-00658-GHW |

**MEMORANDUM OF LAW IN SUPPORT OF**
**MOTION OF WALTER DE SCHUTTER FOR CONSOLIDATION OF THE ACTIONS, APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF SELECTION OF COUNSEL**

**TABLE OF CONTENTS**

TABLE OF CONTENTS ........................................................................................i

TABLE OF AUTHORITIES ..........................................................................ii

PRELIMINARY STATEMENT........................................................................1

STATEMENT OF FACTS ..............................................................................2

ARGUMENT ..........................................................................................6

I. THE ACTIONS SHOULD BE CONSOLIDATED ……………………… …….6

II. THE COURT SHOULD APPOINT MOVANT AS LEAD PLAINTIFF .............7

A. The Procedure Required by the PSLRA ..................................................7

1. Movant Is Willing to Serve as Class Representative ...............................8

2. Movant has the Requisite Financial Interest in the Relief Sought by the Class ....................................................................................9

B. Movant Satisfies the Requirements of Rule 23(a) of the Federal Rules of Civil Procedure.......................................................................................10

1. Movant's Claims are Typical of the Claims of all the Class Members.....11

2. Movant Will Adequately Represent the Class........................................12

III. MOVANT'S CHOICE OF COUNSEL SHOULD BE APPROVED ..................13

CONCLUSION.........................................................................................13

## TABLE OF AUTHORITIES

**Cases**

*In re Drexel Burnham Lambert Grp.*,
960 F.2d 285 (2d Cir. 1992) ........ 11, 12

*Gen. Tel. Co. v. Falcon*,
457 U.S. 147 (1982) ........ 11

*Johnson v. Celotex Corp.*,
899 F.2d 1281 (2d Cir. 1990) ........ 6, 7

*In re Milestone Sci. Sec. Litig.*,
183 F.R.D. 404 (D.N.J. 1998) ........ 10, 11

*Mitchell v. Complete Mgmt., Inc.*,
Case No. 99-CV-1454 (DAB), 1999 WL 728678 (S.D.N.Y. Sept. 17, 1999) ........ 6

*In re Oxford Health Plans, Inc. Sec. Litig.*,
182 F.R.D. 42 (S.D.N.Y. 1998) ........ 11

*In re Party City Secs. Litig*,
189 F.R.D. 91 (D.N.J. 1999) ........ 10

*Primavera Familienstiftung v. Askin*,
173 F.R.D. 115 (S.D.N.Y. 1997) ........ 6

*In re Razorfish, Inc. Secs. Litig.*,
143 F. Supp. 2d 304 (S.D.N.Y. 2001) ........ 2

*Robidoux v. Celani*,
987 F.2d 931 (2d Cir. 1993) ........ 11

*Schulman v. Lumenis, Ltd.*,
2003 WL 21415287 (S.D.N.Y June 18, 2003) ........ 10

*Smith v. Suprema Specialties, Inc.*,
206 F. Supp. 2d 627 (D.N.J. 2002) ........ 2

*Weinberg v. Atlas Air Worldwide Holdings, Inc.*,
216 F.R.D. 248 (S.D.N.Y. 2003) ........ 10

*Weiss v. York Hosp.*,
745 F.2d 786 (3d Cir. 1984) ........ 11

*Weltz v. Lee*,
199 F.R.D. 129 (S.D.N.Y. 2001) ... 6, 9

**Statutes**

15 U.S.C. § 78u-4(a) ... 7

15 U.S.C. § 78u-4(a)(3)(A) ... 7

15 U.S.C. § 78u-4(a)(3)(B) ... passim

15 U.S.C. § 78u-4(e) ... 9

**Rules**

Fed. R. Civ. P. 23(a) ... passim

Fed. R. Civ. P. 42(a) ... 6, 7

## PRELIMINARY STATEMENT

Presently pending before the Court are two securities class action lawsuits (the "Actions") brought on behalf of all persons who purchased securities of Vale S.A. ("Vale" or the "Company"), between November 7, 2013 and November 30, 2015, inclusive ("Class Period").[1] Plaintiffs in the Actions alleges violations of the Securities and Exchange Act of 1934 (the "Exchange Act") against the Company, Murilo Pinto de Oliveira Ferreira ("Ferreira"), Luciano Siani Pires ("Siani") and Peter Poppinga ("Poppinga") (all defendants other than the Company, collectively, the "Individual Defendants").[2]

Movant Walter De Schutter ("Movant") lost approximately $319,372.34 as a result of the alleged fraud during the Class Period. Movants respectfully submit his memorandum of law in support of his motion for (a) consolidation of the actions (b) appointment as Lead Plaintiff pursuant to the Private Securities Litigation Reform Act of 1995, as amended (the "PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B), and (c) for approval of his selection of Levi & Korsinsky LLP ("Levi & Korsinsky") as Lead Counsel.

Movant believes that he has the largest financial interest in the outcome of the case.[3] As such, Movant meets the requirements of the PSLRA for appointment as Lead Plaintiff.

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[1] The Actions are entitled *Hom v. Vale S.A., et al.,* No. 1:15-cv-09539-GHW (the "*Hom* Action") and *Chin v. Vale S.A. et al.,* No. 1:16-cv-00658-GHW (the "*Chin* Action"). The *Hom* Action defines the class period as March 21, 2015 through November 30, 2015, inclusive. The *Chin* Action defines the class period as November 7, 2013 through November 30, 2015, inclusive. For the purposes of this motion, Movant adopts the most inclusive class period of November 7, 2013 through November 30, 2015.

[2] Specifically, plaintiffs in the Actions allege that all defendants violated Section 10(b) of the Exchange Act and rule 10b-5 promulgated under the Exchange Act, as well as Section 20(a) of the Exchange Act. Only the *Chin* Action names Peter Poppinga as a defendant.

[3] Movant's certifications identifying his transactions in Vale securities, as required by the PSLRA, as well as a chart identifying his losses are attached to the declaration of Adam M. Apton ("Apton Decl."), dated February 5, 2016 as Exhibits A and B, respectively.

Moreover, Movants satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure in that his claims are typical of the claims of the Class, and he will fairly and adequately represent the interests of the Class.[4]

The PSLRA provides for the Court to appoint as lead plaintiff the movant that has the largest financial interest in the litigation and have made a *prima facie* showing that it is an adequate class representative under Rule 23 of the Federal Rules of Civil Procedure. *See In re Razorfish, Inc. Secs. Litig.*, 143 F. Supp. 2d 304, 307 (S.D.N.Y. 2001); *see also Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 632 (D.N.J. 2002). Movant satisfies both requirements.

## STATEMENT OF FACTS

Vale is a mining and metals company headquartered in Rio de Janiero, Brazil. Compl. ¶ 7.[5] Samarco Mineração S.A. ("Samarco"), a mining company, is a joint venture owned between the Company and BHP Villiton plc of Australia ("BHP"). ¶¶ 15-16. On November 5, 2015, an accident occurred at Samarco when one of its dams, the Fundao Dam, burst and contaminated the Rio Doce, resulting in several deaths. ¶ 18. The Complaint alleges that Company failed to disclose that: (1) the bursting of the Fundao Dam resulted in the spillage of toxic waste due to the Company's attempt to offset waste management costs and avoid expenses to improve the dam's stability ; (2) the Company had a contract with Samarco that allowed the Company to deposit iron-ore waste from its treatment plants into the Fundao Dam; and (3) the Company's programs and procedures to mitigate environmental, safety, and health incidents were inadequate. ¶ 23; *Chin* ¶ 3.[6]

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[4] The "Class" is comprised of all persons who purchased Vale securities during the Class Period and were damaged thereby. Excluded from the Class are Defendants, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

[5] Citations to "¶ __" are to paragraphs of the Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint") filed in the *Hom* Action. The facts set forth in the Complaint are incorporated herein by reference.

On November 6, 2013, the Company issued a press release announcing its third quarter 2013 financial results with the United States Securities and Exchange Commission ("SEC") on Form 6-K, which stated that it would take steps to minimize operating costs and expenses. *Chin* ¶ 28. The Company touted $2 billion in savings due to decreasing operating costs by $1.126 billion. *Chin* ¶ 28.

On December 2, 2013, the Company held a conference call with analysts and investors to discuss the Company's earnings and operations and emphasized the Company's commitment to safety and environmental responsibility. *Chin* ¶ 29. The Company assured investors that it would deliver value to shareholders through its focus on safety, sustainability, and the environment. *Id.*

On March 27, 2014, the Company filed its annual report with the SEC on Form 20-F for the 2013 fiscal year and stated that the Company had health, safety, and environmental standards and risk management programs and procedures in place to mitigate risks. *Chin* ¶ 30. These statements were reiterated on March 20, 2015 when the Company filed its annual report on Form 20-F for the year 2014. ¶ 21, *Chin* ¶ 40.

On April 30, 2014, July 31, 2014, October 30, 2014, and April 30, 2015, the Company released a series of press releases announcing its financial results for the 2014 first quarter, 2014 second quarter, 2014 third quarter, and 2015 first quarter respectively, which touted a strong operation performance and continuance of cost cutting efforts. *Chin* ¶¶ 33, 36, 38, 42. In a February 26, 2015 press release, the Company stated a reduction of annual operating expenses by over $1.2 billion for the 2014 year. *Chin* ¶ 39.

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[6] Citations to "*Chin* ¶ __" are to paragraphs of the Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint") filed in the *Chin* Action. The facts set forth in the Complaint are incorporated herein by reference.

Then, on May 12, 2015, the truth emerged when Moody issued a negative outlook for the Company and warned that ratings outlook could worsen if Vale is unable to make meaningful progress in cost reduction. *Chin* ¶ 45. As a result, Vale's common stock ADRs declined by $0.29 per ADR. *Id.* Days later, on May 18, 2015, Standard & Poor's downgraded the Company and warned of Samarco's need to maintain its low-cost operations and to manage its debt. *Chin* ¶ 46. As a result, prices declined an additional $0.44 per share. *Id.* Despite these disclosures, the Company issued press releases on July 23, 2015, October 19, 2015, and October 22, 2015 and continued to tout its production increases and declining operating costs. *See Chin* ¶¶ 47-50.

On November 5, 2015, the Fundao Dam burst and released a toxic sludge into the river valley. *Chin* ¶ 51. On November 7, 2015, the *Wall Street Journal* reported that in October 2013, Brazilian prosecutors opened an investigation into Samarco's compliance with the technical requirements contained in its license to operate the Fundao Dam. *Chin* ¶ 52. The local prosecutors' office commissioned a report to test the stability of the Fundao Dam, which included a series of warnings about the dam and highlighted the possibility of destabilization. *Id.* The report further stated that a dam collapse would cause a great mass of waste to flow downstream and damaged nearby communities. *Id.*. The report recommended further studies to be made on the dam's stability. *Id.* Upon this news, shares fell an additional $0.09 per share. *Chin* ¶ 52.

On November 10, 2015, the *Wall Street Journal* published an article stating that there was evidence that the Company dumped debris from one of its own iron-ore mines into

Samarco's waste reservoir, which further pressured the dam system. ¶ 24. Upon this news, prices fell $0.07 per share, almost 2%, to close at $4.04 per share on November 11, 2015. ¶ 25.

On November 16, 2015, the Company held a conference call to discuss the bursting of the Fundao Dam, in which Siani stated that the waste from the Fundao Dam was not toxic. ¶ 22. Additionally, Siani asserted that the material was "not dangerous" and did not react with any other substance. *Id.*

On November 24, 2015, after the market closed, the *Wall Street Journal* published an article discussing the arrangement between the Company and Samarco for the Company's use of Samarco's dam system. ¶ 26. Federal prosecutor José Adércio Leite Sampaio stated that prosecutors would raise the question as to whether a contract that allowed the Company to dump waste from its iron-ore mine into the Samarco dam was properly licensed and monitored. *Id.*

On November 25, 2015, the United Nations ("UN") issued a notice regarding the Samarco and Fundao Dam, which stated that "steps taken by the Brazilian government, Vale and BHP Billiton to prevent harm were clearly insufficient." ¶ 27. The notice further stated that based on new evidence, 50 million tons of iron-ore waste released contained high levels of toxic heavy metals and chemicals. *Id.* Upon this news, Vale securities fell $0.16 per share, over 4%, to close at $3.73 per share that same day. ¶ 28.

On November 27, 2015, the Company issued a joint press release with BHP announcing plans to create a non-profit fund to support the rescue and recuperation of the Rio Doce river system. ¶ 29. On that same day, at a news conference, the Company admitted that there was toxic waste in the Rio Doce. ¶ 30. Vania Somavilla, the Company's director of human relations, health and safety, sustainability and energy, cited a report by the Minas Gerais State Instituted of Water Management which tested water samples from the Rio Doce and found that levels of arsenic, lead, aluminum, chromium, nickel, and cadium were higher than the legal maximums. *Id*. As a result, Vale's securities fell $0.16 per share, over 4%, to close at $3.57 per share that same day. ¶ 31.

On November 30, 2015, the Brazilian government filed a lawsuit against the Company, BHP, and Samarco for $5.2 billion for damages. ¶ 32. As a result, shares fell $0.20 per share, over 5%, to close at $3.37 per share that same day. ¶ 33.

## ARGUMENT

### I. The Actions Should Be Consolidated

The PSLRA provides that "[i]f more than one action on behalf of a class asserting substantially the same claim or claims arising under this [sub-]chapter have been filed," the Court shall not make the determination of the most adequate plaintiff until "after the decision on the motion to consolidate is rendered." 15 U.S.C. § 78u-4(a)(3)(B)(ii). Thereafter, the Court "shall appoint the most adequate plaintiff for the consolidated actions." *Id.*

Under Rule 42(a) of the Federal Rules of Civil Procedure, consolidation is appropriate when the actions involve common questions of law or fact. *See* Fed. R. Civ. P. 42(a). "[C]ourts have taken the view that considerations of judicial economy favor consolidation." *Weltz v. Lee*, 199 F.R.D. 129, 131 (S.D.N.Y. 2001) (quoting *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990)). Consolidation is particularly appropriate in securities class action litigation. *See Mitchell v. Complete Mgmt., Inc.*, No. 99-CV-1454 (DAB), 1999 WL 728678, at *1 (S.D.N.Y. Sept. 17, 1999) ("In securities actions where the complaints are based on the same 'public statements and reports' consolidation is appropriate if there are common questions of law and fact . . . .") (citation omitted); *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 129 (S.D.N.Y. 1997). Courts, therefore, routinely find that consolidating multiple securities cases is an efficient solution where the complaints arise generally from the same alleged false and misleading statements.

The Actions present similar factual and legal issues, as they all involve the same subject matter and are based on the same wrongful course of conduct. The Actions name the substantially the same parties as defendants. Because they arise from the same facts and circumstances and involve the same subject matter, the same discovery and similar class certification issues will be relevant to all related actions. Accordingly, consolidation under Rule 42(a) is appropriate. *See Celotex Corp.*, 899 F.2d at 1285.

Once the Court decides the consolidation motion, the PSLRA mandates that the Court decide the lead plaintiff issue "[a]s soon as practicable." 15 U.S.C. § 78u-4(a)(3)(B)(ii). Here, a prompt determination is reasonable and warranted under Rule 42(a), given the common questions of fact and law presented by the Actions now pending in this District.

## II. THE COURT SHOULD APPOINT MOVANT AS LEAD PLAINTIFF

### A. The Procedure Required by the PSLRA

Once the Court decides the consolidation motion, the PSLRA establishes the procedure for appointment of the lead plaintiff in "each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a).

The plaintiff who files the initial action must publish notice to the class within 20 days after filing the action, informing class members of their right to file a motion for appointment of lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A). The PSLRA requires the Court to consider within 90 days all motions filed within 60 days after publication of that notice by any person or group of persons who are members of the proposed class to be appointed lead plaintiff. 15 U.S.C. §§ 78u-

(a)(3)(A)(i)(II) and (a)(3)(B)(i).

The PSLRA provides a presumption that the most "adequate plaintiff" to serve as lead plaintiff is the "person or group of persons" that:

> (aa) has either filed the complaint or made a motion in response to a notice;
>
> (bb) in the determination of the court, have the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The presumption may be rebutted only upon proof by a class member that the presumptively most adequate plaintiff "will not fairly and adequately protect the interests of the class" or "is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

As set forth below, Movant satisfies the foregoing criteria and are not aware of any unique defenses that Defendants could raise against him. Therefore, Movant is entitled to the presumption that he is the most adequate plaintiff to represent the Class and, as a result, should be appointed lead plaintiff in the Actions.

### 1. Movant Is Willing to Serve as Class Representative

On December 7, 2015, counsel in the first-filed action caused a notice (the "Notice") to be published pursuant to Section 21D(a)(3)(A) of the Exchange Act, which announced that a securities class action had been filed against Vale and which advised putative class members that they had until February 5, 2016 to file a motion to seek appointment as a lead plaintiff in the action.[7] Movant has reviewed a complaint filed in the pending Actions and have timely filed his motion pursuant to the Notice.

**2. Movant has the Requisite Financial Interest in the Relief Sought by the Class**

According to 15 U.S.C. § 78u-4(a)(3)(B)(iii), the Court shall appoint as lead plaintiff the movant or movants with the largest financial loss in the relief sought by the action. As demonstrated herein, Movant has the largest known financial interest in the relief sought by the Class. *See* Apton Decl., Ex. B. The movant who with the largest financial interest and meets the requirements of typicality and adequacy under Rule 23 is presumptively the lead plaintiff. *See Weltz v. Lee*, 199 F.R.D. 129, 132 (S.D.N.Y. 2001).

Under the PSLRA, damages are calculated based on (i) the difference between the purchase price paid for the shares and the average trading price of the shares during the 90-day period beginning on the date the information correcting the misstatement was disseminated, or (ii) the difference between the purchase price paid for the shares and the average trading price of the shares between the date when the misstatement was corrected and the date on which the plaintiff sold their shares, if they sold their shares before the end of the 90-day period. 15 U.S.C. § 78u-4(e).

During the Class Period, Movant purchased Vale securities in reliance upon the materially false and misleading statements issued by defendants, and was injured thereby. Movant suffered a substantial loss of $ 319,372.34. *See* Apton Decl., Exhibit B. Movant thus has a significant financial interest in the outcome of this case. To the best of his knowledge, there is no other applicant who has sought, or is seeking, appointment as lead plaintiff that has a larger financial interest and also satisfies Rule 23.

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[7] An action was filed in this Court on December 7, 2015, entitled *Hom v. Vale S.A.*, No. 1:15-cv-09539-GHW (the "*Hom* Action"). On December 7, 2015, the Notice was published over *Business Wire,* a widely circulated national business oriented wire service. *See* Apton Decl. Exhibit C.

### B. Movant Satisfies the Requirements of Rule 23(a) of the Federal Rules of Civil Procedure

According to 15 U.S.C. §78u-4(a)(3)(B), in addition to possessing the largest financial interest in the outcome of the litigation, the lead plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." Rule 23(a) provides that a party may serve as a class representative if the following four requirements are satisfied:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

With respect to the qualifications of a class representative, Rule 23(a) requires generally that representatives' claims be typical of those of the class, and that representatives will fairly and adequately protect the interests of the class. *See Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 252 (S.D.N.Y. 2003); *Schulman v. Lumenis, Ltd.,* No. 02 Civ. 1989 (DAB), 2003 WL 21415287, at *5-6 (S.D.N.Y June 18, 2003); *Weltz,* 199 F.R.D. at 133 (considering only typicality and adequacy on a motion as lead plaintiff); *see also In Party City Secs. Litig.*, 189 F.R.D. 91, 106 (D.N.J. 1999). *See generally* Fed. R. Civ. P. 23(a)(3)-(4). Furthermore, only a "preliminary showing" of typicality and adequacy is required at this stage. *Weinberg,* 216 F.R.D. at 252. Consequently, in deciding a motion to serve as Lead Plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the Lead Plaintiff moves for class certification. *See id.; Weltz,* 199 F.R.D. at 133; *In re Milestone Sci. Sec. Litig.*, 183 F.R.D. 404, 414 (D.N.J. 1998).

As detailed below, Movant satisfies both the typicality and adequacy requirements of Fed. R. Civ. P. 23, thereby justifying his appointment as Lead Plaintiff.

**1. Movant's Claims are Typical of the Claims of all the Class Members**

Under Rule 23(a)(3), typicality exists where "the claims . . . of the representative parties" are "typical of the claims . . . of the class." Movant plainly meets the typicality requirement of Rule 23 because (i) he suffered the same injuries as the absent class members; (ii) he suffered as a result of the same course of conduct by defendants; and (iii) his claims are based on the same legal issues. *See Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 50 (S.D.N.Y. 1998) (typicality inquiry analyzes whether plaintiff's claims "arise from the same conduct from which the other class members' claims and injuries arise"); *see also Milestone Scientific,* 183 F.R.D. at 414-415. Rule 23 does not require that the named plaintiff be identically situated with all class members. It is enough if their situations share a common issue of law or fact. *See Weiss v. York Hosp.*, 745 F.2d 786, 808-09 (3d Cir. 1984). A finding of commonality frequently supports a finding of typicality. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) (noting that the typicality and commonality requirements tend to merge).

In this case, the typicality requirement is met because Movant's claims are identical to, and neither compete nor conflict with the claims of the other Class members. Movant, like the other members of the Class, acquired Vale securities during the Class Period at prices artificially inflated by Defendants' materially false and misleading statements, and were damaged thereby. Thus, his claims are typical, if not identical, to those of the other members of the Class because Movant suffered losses similar to those of other Class members and his losses result from Defendants' common course of wrongful conduct. Accordingly, Movant satisfies the typicality requirement of Rule 23(a)(3). *See Weiss,* 745 F.2d at 809; *see also In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992).

**2. Movant Will Adequately Represent the Class**

Moreover, Movant is an adequate representative for the Class. Under Rule 23(a)(4), the representative party must "fairly and adequately protect the interests of the class." The PSLRA directs the Court to limit its inquiry regarding the adequacy of the movant to whether the interests of the movant are clearly aligned with the members of the putative Class and whether there is evidence of any antagonism between the interests of the movant and other members of the Class. 15 U.S.C. §78u-4(a)(3)(B); *see Drexel Burnham,* 960 F.2d at 291; *Weltz,* 199 F.R.D. at 133.

Movant's interests are clearly aligned with those of the other members of the Class. Not only is there no evidence of antagonism between Movant's interests and those of the Class, but Movant has a significant and compelling interest in prosecuting the Actions based on the large financial losses he has suffered as a result of the wrongful conduct alleged in the Actions. This motivation, combined with Movant's identical interest with the members of the Class, demonstrates that Movant will vigorously pursue the interests of the Class. In addition, Movant has retained counsel highly experienced in prosecuting securities class actions, and will submit his choice to the Court for approval pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v). Therefore, Movant will prosecute the Actions vigorously on behalf of the Class.

Accordingly, at this stage of the proceedings, Movant has made the preliminary showing necessary to satisfy the typicality and adequacy requirements of Rule 23 and, therefore, satisfy 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). In addition, because Movant has sustained the largest amount of losses from Defendants' alleged wrongdoing, he is, therefore, the presumptive lead plaintiff in accordance with 15 U.S.C. § 78u-4(3)(B)(iii)(I), and should be appointed as such to lead the Action.

## III. MOVANT'S CHOICE OF COUNSEL SHOULD BE APPROVED

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to Court approval. 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should interfere with the lead plaintiff's selection of counsel only when necessary "to protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa).

Movant has selected and retained Levi & Korsinsky as the proposed Lead Counsel for the Class. The members of Levi & Korsinsky have extensive experience in successfully prosecuting complex securities class actions such as this one, and are well-qualified to represent the Class. *See* Apton Decl. Ex. E (the firm resume of Levi & Korsinsky).

## CONCLUSION

For the foregoing reasons, Movant respectfully requests that this Court: (1) consolidate the Actions, (2) appoint Movant as Lead Plaintiff for the Class in the Action; and (3) approve Levi & Korsinsky as Lead Counsel for the Class.

Dated: February 5, 2016

Respectfully submitted,

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